INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statutes and other authorities involved	2
Statement	4
Argument	8
Conclusion	11

CITATIONS

Cases:

Bowles v. *United States*, 73 F. 2d 772, certiorari denied, 294 U.S. 710	10
Brinegar v. *United States*, 338 U.S. 160	9
Rice v. *Ames*, 180 U.S. 371	9
United States v. *Lombardo*, 241 U.S. 73	10
Wampler v. *Snyder*, 66 F. 2d 195	10

Constitution, Statutes and Rules:

Constitution of the United States, Fourth Amendment	2, 9, 10
Internal Revenue Code of 1939, Sec. 3748 (26 U.S.C. 3748)	2
18 U.S.C. 3045	3
Federal Rules of Criminal Procedure:	
Rule 3	4
Rule 4	4

In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 318

GEORGE P. DE HARDIT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion rendered by the District Court in denying the petitioner's motions to dismiss the indictment (Pet. 32-43 and R. 5-17)[1] is reported at 120 F. Supp. 110. The opinion of the Court of Appeals (Pet. 44-51) has not been reported.

---

[1] The record filed by petitioner includes: (1) the appendix to his brief as appellant in the Court of Appeals, here referred to as "R" and (2) the appendix to the Government's brief as appellee in the Court of Appeals, here referred to as "R'."

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1955. The petition for a writ of certiorari was filed on August 12, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the summons issued by the United States Commissioner on March 20, 1953, on complaint of the United States Attorney, constituted a violation of the Fourth Amendment to the Constitution of the United States and was ineffectual to stop the running of the statute of limitations.

2. Whether the evidence justified the trial court's finding that the prosecution was not barred by the statute of limitations.

STATUTES AND OTHER AUTHORITIES INVOLVED

Constitution of the United States, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Internal Revenue Code of 1939:

> SEC. 3748. PERIODS OF LIMITATION.
>
> (a) *Criminal prosecutions.* No person shall be prosecuted, tried, or punished, for any of

the various offenses arising under the internal revenue laws of the United States unless the indictment is found * * * within three years next after the commission of the offense, except that the period of limitation shall be six years—

* * * * *

(2) for the offense of willfully attempting in any manner to evade or defeat any tax or the payment thereof, * * *

* * * * *

Where a complaint is instituted before a commissioner of the United States within the period above limited, the time shall be extended until the discharge of the grand jury at its next session within the district.

* * * * *

(26 U.S.C. 3748.)

18 U.S.C.:

SEC. 3045. INTERNAL REVENUE VIOLATIONS.

Warrants of arrest for violations of internal revenue laws may be issued by United States commissioners upon the complaint of a United States attorney, assistant United States attorney, collector, or deputy collector of internal revenue or revenue agent, or private citizen; but no such warrant of arrest shall be issued upon the complaint of a private citizen unless

first approved in writing by a United States attorney.

Federal Rules of Criminal Procedure:

Rule 3. *The Complaint.*

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. *Warrant or Summons Upon Complaint.*

(a) *Issuance.* If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant has committed it, a warrant for the arrest of the defendant shall issue to any officer authorized by law to execute it. Upon the request of the attorney for the government a summons instead of a warrant shall issue. More than one warrant or summons may issue on the same complaint. If a defendant fails to appear in response to the summons, a warrant shall issue.

* * * * *

STATEMENT

On April 9, 1953, a one-count indictment was returned against petitioner in the United States

District Court for the Eastern District of Virginia charging him with having wilfully attempted to defeat and evade a large part of his income tax for the calendar year 1946 by filing and causing to be filed with the Collector of Internal Revenue for the Internal Revenue Collection District of Virginia, at Richmond, a false and fraudulent income tax return. (R. 1-2.) Specifically, the indictment charged the following deficiencies:

	Reported		*Corrected*	
Year	*Income*	*Tax*	*Income*	*Tax*
1946	$17,254.49	$4,383.88	$26,019.73	$8,749.95

Prior to trial petitioner filed motions to dismiss the indictment on two grounds: (1) that the prosecution had not been instituted within six years after the filing of his 1946 return, because the return had been filed on March 15, 1947, and the complaint which instituted the proceeding had not been filed until March 20, 1953; and (2) that the complaint, even if filed within the six-year period, failed to reveal probable cause for belief that an offense had been committed, and hence was void and ineffectual to toll the running of the statute of limitations. (R. 2-5.) After a hearing the trial court denied the motions and filed a formal opinion discussing the facts and the law. (R. 5-17.) After the jury had found petitioner guilty as charged, the same points were raised by a motion to set aside the verdict and petitioner was allowed to present certain additional evidence as to the time of filing of his 1946 return. The motion was denied. (R. 18-20, 36-46.) On March 4, 1955, petitioner

was sentenced to imprisonment for a period of one year and fined $5,000. (R. 21.) The Court of Appeals affirmed the conviction. (Pet. 44-51.)

Petitioner, a practicing attorney for thirty years (Pet. 5), does not challenge the sufficiency of the evidence to support his conviction, and none of that evidence appears in the record before this Court. The evidence concerning the filing of the income tax return for the year 1946 in March, 1947, and concerning the filing of the complaint by the United States Attorney on March 20, 1953, to stop the running of the statute of limitations, may be summarized as follows:

Petitioner's return was prepared by an accountant in Richmond, Virginia, then given to a secretary who typed the final return and made a record dated March 15, 1947, showing that she had done the typing. On direct examination, the secretary stated that the return was mailed from her office on the same day, and she testified that she knew the return was mailed because they never let the mail slip by on March fifteenth, which at that time was the deadline for filing tax returns. (R.' 16-20.) On cross-examination, however, she admitted that she did not always mail tax returns, although it was her responsibility to see that they were mailed; that they were always sent to the post office by some reliable person; that the office records did not show the mailing of the return on March 15, 1947, as such; and that the return could have been given to petitioner for him to mail personally. (R.' 22-24.)

Petitioner's return for the year 1946 was stamped received on March 20, 1947, at the office of the Collector of Internal Revenue, Richmond, Virginia. A representative of the office of the Collector testified that the return had been received in the office on the day it was stamped received. (R. 7.) After sentence had already been imposed upon petitioner, the deposition of the postmaster of the Richmond post office was read into the record. The postmaster testified that in the normal course of the mails a tax return mailed in Richmond on Saturday, March 15, 1947, would reach the office of the Collector in Richmond on Monday, March 17. (R. 39-40.) On cross-examination, however, he admitted that he had no personal knowledge of the return in question. (R. 41, 44.)

On March 20, 1953, the United States Attorney appeared before the United States Commissioner and swore to a complaint charging petitioner with tax evasion for 1946. The complaint alleged that petitioner wilfully attempted to evade a large part of his taxes for the year 1946 by filing a false and fraudulent return in which he stated that his net income was $17,254.49, on which a tax of $4,383.88 was due, whereas, as he then knew, his net income for the year was $27,921.60, on which he owed a tax of $9,729.77. (R. 15-16.) The United States Attorney swore before the United States Commissioner to the truth of the facts alleged in the complaint. The Commissioner did not question the United States Attorney before issuing a summons, but the latter testified at the hearing on the motions

to dismiss that he had personal knowledge of the facts stated in the complaint because he had previously presented the case to a grand jury which refused to indict petitioner. In that earlier proceeding petitioner had appeared before the grand jury and had been cross-examined by the United States Attorney. (R. 28-32.)

The Commissioner issued a summons on the complaint directing petitioner to appear before him for a hearing on April 15, 1953, but the hearing was never held, presumably because an indictment was returned on April 9, 1953. (R. 5, 36-37.) The Commissioner testified that although he had not examined the United States Attorney, he had determined there was probable cause to issue the summons based upon the oath of the United States Attorney as to the truth of the facts contained in the complaint. (R. 34, 37.)

ARGUMENT

1. The complaint which instituted the criminal proceedings against petitioner indicated on its face the existence of probable cause for belief that an offense had been committed. The United States Attorney did not purport to be acting on a mere suspicion. He stated *under oath* in the complaint that petitioner had wilfully attempted to evade income taxes amounting to about $5,500 for the year 1946 by filing a false and fraudulent return understating his net income by more than $10,000. (R. 15-16.) Thus he clearly asserted personal knowledge of facts which, if true, would justify a con-

viction. *Rice* v. *Ames*, 180 U.S. 371, 376. It is true that some of these facts were stated in the form of conclusions, and that the Commissioner did not question the prosecutor to determine what ultimate facts formed their basis. But at the hearing on the motions to dismiss the indictment the United States Attorney made it perfectly clear that he did have personal knowledge of the facts when he filed the complaint, for he testified that he had presented the case to a previous grand jury and had cross-examined petitioner during the course of that proceeding. (R. 29-31.) There can be no doubt that probable cause did exist for the filing of the complaint and the issuance of the summons. Cf. *Brinegar* v. *United States*, 338 U.S. 160, 174.

Petitioner is reduced to the contention (Pet. 8-25) that, despite the clear affirmation of personal knowledge in the complaint and despite indisputable evidence of the United States Attorney's actual knowledge of facts constituting probable cause, the complaint and the summons issued thereon were void simply because the Commissioner failed to ask the prosecutor questions which would have revealed the facts underlying some of the conclusions in the complaint. The Fourth Amendment (*supra*, p. 2) prohibits the issuance of a warrant unless the magistrate is satisfied of the existence of probable cause. It does not, however, prescribe any particular mechanics by which the magistrate shall satisfy himself of this. Here, the Commissioner testified that he was satisfied of the existence of probable cause when he issued the summons (R.

34, 37), and the testimony of the United States Attorney and petitioner's subsequent indictment and conviction on evidence, the sufficiency of which is unchallenged, make it clear that probable cause did exist. Even though it would have been appropriate, as the opinion of the court below recognizes (Pet. 51), for the Commissioner to question the United States Attorney, this was not required by the language of the Fourth Amendment. The complaint stated probable cause upon its face, the Commissioner was satisfied that it existed, and the record clearly establishes that it did exist. Petitioner's contention is without merit.

2. Petitioner contends (Pet. 25-29) that the prosecution was barred by the expiration of the statutory six-year period of limitations. The complaint was filed on March 20, 1953, and the argument is that petitioner's return must have been filed in Richmond, Virginia, prior to March 20, 1947, since it was mailed in that same city on March 15, 1947.

The contention is without support in the record. This Court has held that a document is filed when it is delivered to a proper official and by him received and filed. *United States* v. *Lombardo*, 241 U.S. 73. See also *Bowles* v. *United States*, 73 F. 2d 772, 774 (C.A. 4), certiorari denied, 294 U.S. 710; *Wampler* v. *Snyder*, 66 F. 2d 195, 196 (C.A. D.C.). The District Court found as a fact that the return had not been filed until March 20, 1947, and, whether the burden of proof rested with the prosecution or the defense, the finding is clearly sup-

ported by the record, for the only positive evidence on the issue was the fact that the return was stamped received and filed on that date. (*Supra*, p. 7.) Petitioner resorts to speculation when he argues (Pet. 28) that the return must have been filed earlier because it was mailed on March fifteenth and "it is a matter of common knowledge that deliveries are made in one or two days." It was not, as petitioner asserts (Pet. 29), "physically impossible for the return not to have been received before March 20, 1947," for there was evidence that delays in delivery did occur (R. 42-44).

CONCLUSION

The decision of the court below is clearly correct and there is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted,

SIMON E. SOBELOFF,
Solicitor General.
H. BRIAN HOLLAND,
Assistant Attorney General.
JOSEPH M. HOWARD,
EUGENE EMERSON,
Attorneys.

SEPTEMBER, 1955.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1955 857344 901